

**Target Rock Corporation, a subsidiary of Curtiss-Wright Corporation and Local 431, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO.** Cases 29-CA-17103, 29-CA-17325, 29-CA-17829, 29-CA-17973, and 29-CA-18176

September 18, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On June 22, 1995, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the judge's decision, and the Charging Party and the Respondent filed answering briefs.<sup>1</sup>

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the judge's recommended Order, as modified and set forth in full below.<sup>2</sup>

The judge found, inter alia, that the Respondent failed to prove that the individuals whom it hired to replace the economic strikers were permanent employees, and he concluded therefrom that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers following their unconditional offer to return to work. The Respondent has excepted to the judge's failure to find that the replacements were permanent employees and argues that their permanent status justified the Respondent's failure to reinstate the former strikers. We find no merit in these exceptions, and we affirm the judge's findings and conclusions on this issue, except as noted below.<sup>3</sup>

It is well settled that it is an unfair labor practice for an employer to refuse to reinstate strikers unless it

can show that its action was due to legitimate and substantial business justifications. The permanent replacement of economic strikers is a substantial and legitimate business justification for refusing to reinstate former strikers, but it is an affirmative defense, and the employer has the burden of proof. See, e.g., *Associated Grocers*, 253 NLRB 31, 31-32 (1980), affd. mem. sub nom. *Transport Drivers Local 104 v. NLRB*, 672 F.2d 897 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982). Significant in meeting this burden is an adequate showing that there was a mutual understanding between the Respondent and the replacements that the nature of their employment was permanent. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987).

Under the precedents, proof of whether an offer of employment is permanent cannot rest solely on the wording of the offer,<sup>4</sup> as the Respondent contends, but rather, whatever the wording, it must ultimately establish that the replacements were hired in a manner that would "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis."<sup>5</sup>

In this case there is a substantial showing that the replacements did not understand that they were hired as permanent employees and that the Respondent did not intend for them to be so. Although the Respondent periodically used the term "permanent" in its communications with the replacement employees, the context of these statements and the entirety of the circumstances reveals that the Respondent never intended that these employees become permanent replacements and that the replacements had no adequate basis for considering themselves permanent.

As the judge noted, at least 26 of the 32 replacements still employed at the end of the strike indicated on their employment applications that they were responding to an advertisement.<sup>6</sup> Every advertisement stated:

Target Rock Corporation . . . is in the midst of negotiations with striking union members. We have IMMEDIATE POSITIONS AVAILABLE in the following specialties: [Job openings listed.]

All positions could lead to permanent full-time after the strike.

<sup>1</sup>No exception was filed to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a) (1), (3), and (5) of the Act by offering participation by strike replacement employees in its 401(k) savings plan. Consequently, it is unnecessary for Chairman Gould to pass on the judge's dismissal of this allegation. He does note, however, that for the reasons expressed in his statement of position in *Chicago Tribune*, 318 NLRB 920, 928 fn. 30 (1995), he disagrees with Board precedent holding that employers have no obligation to bargain about the terms and conditions of employment for strike replacements.

<sup>2</sup>We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

<sup>3</sup>In light of the undisputed evidence and the judge's findings set out in the text of his decision, we find merit in the Respondent's exception to the judge's apparently inadvertent statements in his analysis that the Respondent never told the replacements that they were permanent. The full context of these statements is set out below, as is our rationale for upholding the judge's conclusions on this issue.

<sup>4</sup>The presence or absence of "the magic word 'permanent'" is not the sine qua non of the determination of permanent employment. See *Crown Beer Distributors*, 296 NLRB 541, 549 (1989).

<sup>5</sup>*Georgia Highway Express*, 165 NLRB 514, 516 (1967), affd. sub nom. *Truck Drivers & Helpers Local 728 v. NLRB*, 403 F.2d 921 (D.C. Cir.), cert. denied 393 U.S. 935 (1968).

<sup>6</sup>Four applicants did not indicate how they had learned of the job opening, and the remaining two each named an existing employee who had referred them for employment.

Consequently, those responding to advertisements had a reasonable basis for believing that the jobs were not permanent and that a determination as to whether they could become permanent employees was to be deferred until the strike ended.

The parties stipulated that the replacement employees were told when they were hired, beginning in July,<sup>7</sup> in substance, that:

You are considered permanent at-will employees unless the National Labor Relations Board considers you otherwise, or a settlement with the Union alters your status to temporary replacement.<sup>8</sup>

Coupled with text of the job advertisement, there is little to draw from to support the Respondent's claim that these replacements were given assurances on their hire that their status was that of permanent employees. To the extent that the Respondent reserved to the Board the authority to determine the status of the replacement employees, it is apparent that the Respondent anticipated the prospect of the Board's intervention in the current litigation, and in the first instance was willing to accept as authoritative our determination that the replacements be regarded as temporary employees.

Nor is it established on this record that the hires had reason to know, either from filling out the application and notice of employment forms, having to pass drug and alcohol screening tests, or receiving various employment benefits, that they were permanent employees. The employment and screening forms contain no references to permanent employment. Indeed, the application for employment form signed by each applicant contained the following statement: "I understand that the employer follows an employment-at-will policy in that I or the employer may terminate my employment at any time, or for any reason consistent with applicable state or federal law." This obviously does not support the Respondent's position that the striker replacements were permanent.<sup>9</sup> Finally, as the judge

<sup>7</sup> All dates are in 1993.

<sup>8</sup> This stipulation is consistent with the testimony of Charles Haines, the only replacement witness at the hearing, who testified that he questioned the hiring interviewer, Supervisor Brian Maher, whether he would be a permanent employee. Haines testified that Maher replied that as far as Maher was concerned the job was permanent, but that it would hinge on whether the Union accepted the proposed contract, or if the Board ruled against the Company.

<sup>9</sup> Although in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Supreme Court expressed the view that the inclusion of conditions in an offer of employment would not necessarily foreclose a finding that the offer was permanent, none of the examples given or referenced by the Court included statements to the effect that the employee could be discharged at any time for any reason. Indeed, the Court, in distinguishing *Covington Furniture Mfg. Corp.*, 212 NLRB 214 (1974), made clear that the kinds of "conditional" offers it believed could be defended as offers of permanent employment did not include offers advising replacements that they "could be fired at the will of the employer for any reason." 463 U.S. at 504-505 fn 8. See also discussion, *infra*.

observed, there was no probative evidence concerning the Respondent's eligibility requirements for benefits; there was only unclear and contradictory testimony by officials of Curtiss-Wright, the parent company.

Likewise, there is substantial credited evidence showing that the Respondent did not intend the replacements to be permanent employees but intended, at most, to keep its options open to make them permanent employees later if it so chose. During negotiations in July, the Respondent's negotiators stated that the replacements were temporary and further that they would be discharged if the parties reached agreement on a contract and the strikers would be called back. On September 7, the Respondent's counsel, Aaron Carr, told the Union that the Respondent would discharge the replacements if the Union made an unconditional offer to return to work. Also in September, Richard Diamant, the Respondent's director of human resources, expressly referred to the hires as temporary replacements in an affidavit taken by the General Counsel. In an exchange with picketing employee Richard DeViglio, he stated that replacement employees would be discharged when striking employees returned to work. Carr reconfirmed to the Union the status of the replacements by stating on November 3 that he would permit strikers to return to work and terminate the replacements if the strikers made an unconditional offer to return to work. Finally, in a November 15 bargaining session, Carr stated that the replacements were "not permanent." The aforesaid statements attributed to the Respondent's representatives amply demonstrate the Respondent's own belief that the replacements were no more than temporary employees.

It is also clear that the replacements' doubts about whether they were permanent employees persisted in the months following their hire. Thus, the evidence shows that Diamant admittedly knew of a conversation, between October 15 and November 3, in which the Respondent's counsel was advised that a "strong pitch" would be made for the strikers to end the strike and return unconditionally to work. Diamant acknowledged that rumors to that effect had apparently distressed the replacements and caused him to distribute the following memorandum on November 19 to all the replacements in an effort to clarify their status:

It has come to my attention that some of you have been questioning your employment status at Target Rock Corporation.

You are considered permanent at-will employees unless the National Labor Relations Board considers you otherwise or a settlement with the Union alters your status to temporary replacement.

There is no showing, however, that the above statement allayed the replacements' fears, nor do we be-

lieve that it contained sufficiently strong assurances to reasonably achieve that result. For, in these circumstances of renewed expressions of doubt as to the nature of their employment triggered by the rumors of the strikers' imminent return, it is highly improbable that the Respondent's mere invocation of the same equivocal language which had made the terms of hire of the replacements ambiguous, because of its inconsistency with the Respondent's advertisements, would adequately convey sufficient assurances of permanent employment to the replacements.<sup>10</sup>

We find no merit in the Respondent's argument that the periodic use of the term "permanent" in its statements to the replacements, at the time of their hire and thereafter, clearly shows that they had obtained permanent employment. The Respondent contends that the judge erroneously rejected its claim that the statement made to replacement employees on their hire showed their permanent employment, notwithstanding its stated conditions, and that the judge's analysis was in contravention of the Supreme Court's holding, in *Belknap, Inc. v. Hale*, "[T]hat the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass."<sup>11</sup>

Even accepting that the "conditions" in the Respondent's statements to the replacements (at the time of their hire and in the November 19 memorandum) do not negate an offer of permanent employment, it is necessary that the evidence as a whole support, rather than undermine, the message of permanent employment, and that that message be so understood by the replacements. The Respondent's reliance on the particular statement made to replacements on their hire fully ignores the broader context in which this statement was inserted.

We find from the foregoing evidence that the Respondent and the replacement employees did not share any mutual understanding that the replacements were hired as permanent employees. Rather, as the judge found, the evidence shows that the Respondent purposefully intended to keep its options open with respect to whether the replacements would be temporary or become permanent employees. Furthermore, there is no evidentiary support for the proposition that the replacements believed, or had sufficient reason to believe, that they were permanent employees. We therefore conclude that the Respondent has not met its bur-

den of establishing that the striker replacements were permanent employees and, accordingly, we adopt the judge's findings and recommended Order.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and as set forth in full below and orders that the Respondent, Target Rock Corporation, a subsidiary of Curtiss-Wright Corporation, East Farmingdale, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to furnish, in a timely manner, information requested by Local 431, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO for performing its representative function of processing employee grievances.

(b) Offering financial benefits to union representatives to influence them in making their decisions concerning collective-bargaining issues.

(c) Unilaterally offering its employees who returned to work during the strike, its section 401(k) employee savings plan, while refusing the Union's request for the same benefit during collective-bargaining negotiations and thereby discouraging its employees from continuing to engage in a strike.

(d) In any manner engaging in surface bargaining or other bad-faith bargaining, without real intention of reaching a meaningful collective-bargaining agreement with the Union as the duly recognized exclusive bargaining representative of its employees in the appropriate collective-bargaining unit, described below, including offering bargaining proposals that would interfere with the exercise by its employees of their rights under Section 7 of the National Labor Relations Act and that would reserve to it complete control over the terms and conditions of employment of its employees, while providing to the Union no effective means to redress grievances.

(e) Penalizing its employees because the Union sought relief from the National Labor Relations Board by demanding bargaining concessions as compensation for the costs attributable to responding to unfair labor practice charges.

(f) Refusing to reinstate its striking employees to their former or substantially equivalent positions of employment.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of its employees in the

<sup>10</sup>In contrast, see the June 29 posthiring memorandum which the U.S. Court of Appeals for the District of Columbia Circuit found clearly stated that the company considered the replacements to be permanent. *Gibson Greetings Inc. v. NLRB*, 53 F.3d 385, 390 (D.C. Cir. 1995).

<sup>11</sup>463 U.S. 491, 504 fn. 8 (1983). The Court further stated that "All hirings are to some extent conditional." We therefore disavow the judge's statement that "[T]he essence of permanence is that the promise must be unconditional."

following appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production, maintenance, shipping and receiving employees, and drivers employed by Target Rock Corporation at its East Farmingdale facility, excluding all office clerical, professional, laboratory technicians, drafting, engineering, field service, sales employees, watchmen, guards, supervisors within the meaning of the Act, and regular part-time employees averaging less than twenty (20) hours per week, and temporary summer help employed between June 15 and August 31 only.

(b) Within 14 days from the date of this Order, offer immediate and full reinstatement to the employees whose names appear below and all other employees who applied unconditionally for reinstatement to their former or substantially equivalent positions of employment, if available, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, replacement employees in order to make positions available for them, and place any remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by Respondent and offer them employment before any other persons are hired:

Anthony Accardi	George Gulla
Robert Baatz	James Johnson
Ali Bakhshoudeh	Kenneth Kaufman
Robert Banks	Michael Manos
Andrew Bellise	Frederick Manzi
Morton Berkowitz	Mark McClary
Frank Crawford	Nathaniel Merritt
Jose Cuevas	William Muller
Frank DeViglio	Thomas Murtagh
Richard DeViglio	Carl Reff
Richard Duffy	Harold Roller
Carl Fowler	Paul St. Hilaire
Henry Galacz	Steven Suydam
Salvatore Gerlando	Nicholas Votinelli
Frank Greco	Jeffrey Wise

(c) Make whole the above-named employees for the period from February 22, 1994, and the employees named below for the period from February 22, 1994, until the date set forth opposite their names, for any loss of earnings or benefits they suffered as a result of Respondent's failure to timely reinstate them to their former or substantially equivalent positions of employment in the manner set forth in the remedy section:

John Corbin	March 25, 1994
Dave Crayton	June 25, 1994
Frank Blachian	July 9, 1994
William Perry	July 9, 1994

Brian Zatkowski	July 9, 1994
John Vernillo	July 11, 1994
Leonard Barlitz	July 13, 1994
Charles Foster	July 18, 1994
Benjamin Fernandez	September 24, 1994
Milton Hewitt	September 24, 1994
Tiloki Ramsarup	September 24, 1994
Craig Beder	December 10, 1994
John Schmitt	December 10, 1994

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after services by the Region, post at its facility in East Farmingdale, New York, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HIGGINS, concurring.

I agree with my colleagues that Respondent has not established that the replacements involved here were "permanent replacements" for the strikers. However, my rationale for this conclusion differs somewhat from that of my colleagues. Thus, I write this separate concurrence.

In my view, the phrase "permanent replacement" must be understood in the context of labor law principles. More specifically, the phrase connotes an intention, mutually understood by employer and employees, to retain the replacements even after the strikers offer to return.<sup>1</sup> However, the intention of permanence need not be a binding unconditional promise. For example, an employer can couple its "intention" language with a statement that no promises are made, i.e., employment is "at will." Similarly, the employer can condi-

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> By contrast, the understanding is that temporary replacements will be terminated when the strikers offer to return.

tion the intention with a statement that a decision by the National Labor Relations Board or a settlement with the Union may result in termination of the replacement. Such statements do not vitiate the intention to have permanent replacements, and such conditions do not make the replacement “any less permanent.”<sup>2</sup>

The afore-mentioned principles are good for collective bargaining and for the policies of the National Labor Relations Act. Thus, the employer can exercise its statutory privilege to hire permanent replacements, and can nonetheless leave open the possibility of immediate reinstatement of strikers pursuant to a settlement agreement with the union, or the settlement or adjudication of a National Labor Relations Board case. In addition, the employer can preserve its legitimate interest in protecting itself from individual-employee lawsuits grounded in state law.

In light of the above, I would not base a finding of “temporary replacement” status on an employer’s retention of the right to discharge replacements in the afore-mentioned defined circumstances. In short, there can be, at the time of hire, a mutual intention that the replacements be permanent, albeit with the possibility that future events may result in termination. However, in the instant case, the evidence shows that the Respondent intended that the replacements be temporary, albeit with the possibility that they might subsequently be made permanent. In this regard, I note that the advertisement for replacements said that “all positions *could lead* to permanent full time after the strike” (emphasis added). The reasonable understanding of this statement is that the intention was for nonpermanence, albeit the positions could become permanent after the strike. In addition, Respondent told the Union in July that the replacements were temporary. Further, from September through November, Respondent repeatedly told the Union and employees that Respondent would discharge the replacements if the strikers offered to return.

In sum, on the facts of this case, I find that Respondent has not shown that the replacements were permanent. However, as discussed above, I do not rely upon all of the rationale of my colleagues. More specifically, I believe that employers can show “permanence” even if they use language to retain flexibility and protection.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to furnish, in a timely manner, information requested by Local 431, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO for performing its representative function of processing employee grievances.

WE WILL NOT offer financial benefits to union representatives to influence them in making their decisions concerning collective-bargaining issues.

WE WILL NOT unilaterally offer our employees who returned to work during the strike, our section 401(k) employee savings plan, while refusing the Union’s request for the same benefit during collective-bargaining negotiations and thereby discouraging our employees from continuing to engage in a strike.

WE WILL NOT in any manner engage in surface bargaining or other bad-faith bargaining, without real intention of reaching a meaningful collective-bargaining agreement with the Union as the duly recognized exclusive bargaining representative of our employees in the appropriate collective-bargaining unit, described below, including offering bargaining proposals that would interfere with the exercise by our employees of their rights under Section 7 of the National Labor Relations Act and that would reserve to us complete control over the terms and conditions of employment or our employees, while providing to the Union no effective means to redress grievances.

WE WILL NOT penalize our employees because the Union sought relief from the National Labor Relations Board by demanding bargaining concessions as compensation for the costs attributable to responding to unfair labor practice charges.

WE WILL NOT refuse to reinstate our striking employees to their former or substantially equivalent positions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of our employees

<sup>2</sup> *Belknap, Inc. v. Hale*, 463 U.S. 491 at 503 fn 8.

in the following appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

All production, maintenance, shipping and receiving employees, and drivers employed by Target Rock Corporation at its East Farmingdale facility, excluding all office clerical, professional, laboratory technicians, drafting, engineering, field service, sales employees, watchmen, guards, supervisors within the meaning of the Act, and regular part-time employees averaging less than twenty (20) hours per week, and temporary summer help employed between June 15 and August 31 only.

WE WILL, within 14 days from the date of this Order, offer immediate and full reinstate to our employees whose names appear below and all other employees who applied unconditionally for reinstatement to their former or substantially equivalent positions of employment, if available, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, replacement employees in order to make positions available for them, and place any remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by us and offer them employment before any other persons are hired:

Anthony Accardi	George Gulla
Robert Baatz	James Johnson
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Morton Berkowitz	Mark McClary
Frank Crawford	Nathaniel Merritt
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Frank Greco	Jeffrey Wise

WE WILL make whole the above-named employees for the period from February 22, 1994, and the employees named below for the period from February 22, 1994, until the date set forth opposite their names, for any loss of earnings or benefits they suffered as a result of our failure to timely reinstate them to their former or substantially equivalent positions of employment, with interest:

John Corbin	March 25, 1994
Dave Crayton	June 25, 1994
Frank Blachian	July 9, 1994
William Perry	July 9, 1994

Brian Zatkowski	July 9, 1994
John Vernillo	July 11, 1994
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John Schmitt	December 10, 1994

TARGET ROCK CORPORATION, A SUBSIDIARY OF CURTISS-WRIGHT CORPORATION

*Rhonda Aliouat, Esq.*, for the General Counsel.  
*Irving Hurwitz, Esq.* and *David A. Cohen, Esq. (Carpenter, Bennett & Morrissey)*, of Newark, New Jersey, for the Respondent.

*Nicholas F. Lewis, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz, P.C.)*, of New York, New York, for the Charging Party.

#### DECISION

##### FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On February 22, 1994, Charging Party Local 431, International, Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (the Union) unconditionally offered on behalf of the employees who were on strike against their Employer, Respondent Target Rock Corporation, to return to work. On March 1, 1994, Respondent wrote the Union that the then current strike was an economic strike and that, as of that date, there were no vacancies. There are two principal issues in this proceeding brought under the National Labor Relations Act (the Act): (1) whether Respondent should have rehired the striking employees because it never hired permanent replacements during the economic strike; and (2) whether Respondent should have rehired them because it committed unfair labor practices which converted the economic strike into an unfair labor practice strike.<sup>1</sup>

Jurisdiction is conceded. Respondent, a subsidiary of Curtiss-Wright Corporation (Curtiss-Wright) and a New York corporation with its principal office, factory, and place of business in East Farmingdale, New York, has been engaged in the manufacture and distribution of valves and machine parts for submarines. During 1994, a representative period, Respondent purchased and received goods and materials valued in excess of \$50,000 directly from firms located outside New York. I conclude, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, with which Respondent has had

<sup>1</sup> The relevant docket entries are as follows: The charges in Cases 29-CA-17103, 29-CA-17325, 29-CA-17829, and 29-CA-18176 were filed by the Union on January 19, 1993, May 5, 1993, November 15, 1993, and April 28, 1994, respectively. The charge in Case 29-CA-17973 was filed by the Union on January 31, 1994, and amended on March 28, 1994. The final consolidated complaint issued on December 22, 1994. The hearing was held on January 30 to February 3, 1995, in Brooklyn, New York.

a collective-bargaining relationship for about 25 years, is a labor organization within the meaning of Section 2(5) of the Act. Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production, maintenance, shipping and receiving employees, and drivers employed by Target Rock Corporation at its East Farmingdale facility, excluding all office clerical, professional, laboratory technicians, drafting, engineering, field service, sales employees, watchmen, guards, supervisors within the meaning of the Act, and regular part-time employees averaging less than twenty (20) hours per week, and temporary summer help employed between June 15 and August 31 only.

The parties' most recent collective-bargaining agreement expired on May 13, 1993,<sup>2</sup> by which time the parties had been unsuccessful in reaching a new agreement. The Union began its strike the next day, May 14. The General Counsel's brief does not claim that the strike was called to protest, in whole or in part, Respondent's unfair labor practices of contracting out work or refusing to produce information in connection with its subcontracting, discussed below; but the Union instructed that all the picket signs indicate that the strike was called to protest Respondent's unfair labor practices, and, with perhaps three or four exceptions, all signs so indicated throughout the length of the strike and never changed, even after what the complaint alleges to be the conduct that converted the strike from an economic to an unfair labor practice strike.<sup>3</sup>

In May, Martin Benante, Respondent's president, authorized his management to see whether persons would be interested in working for a firm that was on strike. Respondent ran a series of advertisements in local newspapers, as well as some papers from New York City, almost all of which stated, in part: "All positions *could* lead to permanent full-time after the strike."<sup>4</sup> [Emphasis added.] By June, Respondent had interviewed enough applicants to create a pool of replacements. Respondent began to hire replacements in July and told them, specifically the 32 who were still employed at the time that the Union offered reinstatement, that they were considered permanent at will employees unless the National Labor Relations Board considered them otherwise, or a settlement with the Union altered their status to temporary replacements. All applicants signed a declaration on their applications: "I understand that the employer follows an employment-at-will policy in that I or the employer may terminate my employment at any time, or for any reason consistent with applicable state or federal law."

In November 1993 there were rumors in the shop that the strikers were returning and the replacements would them-

selves be replaced. To answer those fears, about November 19, Richard Diamant, Respondent's director of human resources, issued to all strike replacements the following memorandum, which is entirely consistent with what Respondent had told the replacements during their initial interviews:

It has come to my attention that some of you have been questioning your employment status at Target Rock Corporation.

You are considered permanent at-will employees unless the National Labor Relations Board considers you otherwise or a settlement with the Union alters your status to temporary replacement.

Economic strikers are entitled to immediate reinstatement to their prestrike jobs, unless Respondent can demonstrate a legitimate and substantial business justification for not doing so. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970). Respondent contends that it permanently replaced the striking employees, which would be sufficient justification for its refusal to return the economic strikers to their former positions of employment. *Associated Grocers*, 253 NLRB 31 (1980), *enfd. mem. sub nom. Teamsters Local 104 v. NLRB*, 672 F.2d 897 (D.C. Cir. 1981), *cert. denied* 459 U.S. 825 (1982). All parties recognize that Respondent has the burden of establishing that it permanently replaced the strikers. *Ibid.* The determination of the status of replacement employees as either temporary or permanent is based on the mutual understanding between the employer and the replacements. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Harvey Mfg.*, 309 NLRB 465 (1992); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), *enfd. mem.* 812 F.2d 1443 (D.C. Cir. 1987), *cert. denied* 484 U.S. 845 (1987).

In *Hansen Bros.*, the employer merely told the strikers that they "may" lose their jobs if replacements were hired for their positions and never told the replacements that they were permanent. The employer's president told the replacements that he "wanted" to consider them as permanent employees and "wanted" them to consider themselves as permanent. There was no evidence that the replacement employees understood that they were permanent. As a result, the Board found that there was no mutual understanding about their permanence and ordered that the economic strikers be reinstated. In *Gibson Greetings*, 310 NLRB 1286 (1993), the Board found the employer's proof similarly lacking. One employee understood that she would maintain her job only "till this was all over." When the replacement employees asked about the status of their job, the employer's human resources manager replied that "there was a possibility that the company and the union could renegotiate an agreement and that new hires could be placed on lay-off subject to their manning requirements at the time." The Board held that this statement was far from an unequivocal assurance to the replacements that their employment was permanent. *Id.* at 1290. In *Harvey*, despite telling the replacement employees at their interviews that they were permanent, subject to a 30-day trial period, there were also enough documents that indicated that they were only temporary. The Board found "mixed signals," at best, that were "necessarily ambiguous." 309 NLRB at 468. Thus, the Board concluded that the employer did not establish that there was a mutual understanding be-

<sup>2</sup> All dates hereinafter refer to 1993, unless otherwise stated.

<sup>3</sup> I reject the Union's contention that the strike was called to protest Respondent's unfair labor practices. Other than the signs, there is no evidence that that was the purpose of the strike.

<sup>4</sup> Some of the advertisements that appeared later in the strike, the last one in evidence being on October 24, omitted the word "all" or were phrased in the singular. Of the 32 replacement employees employed by Respondent when the Union discontinued its strike, 26 answered one of Respondent's advertisements.

tween it and the replacement employees that they were being hired on a permanent basis. *Ibid.*

Respondent's statements to its replacement employees are equally necessarily ambiguous. Despite the testimony of replacement employee Charles Haines that he considered himself permanent,<sup>5</sup> Respondent made no assurances. Permanent status could be erased by a finding of the Board or, of importance here, if the Union and Respondent agreed that the replacement employees were not permanent employees. Indeed, when Diamant handed out Respondent's memorandum in November, hoping to allay their fears of being replaced once the strike ended, some employees were satisfied by the explanation and some were not, obviously because the memorandum was susceptible to the interpretation that the employees could lose their jobs. The Board made clear in *Gibson Greetings*, *id.* at 1291 fn. 23, that an employer, in a strike situation, has a greater obligation to make clear its intention to offer permanent employment:

Here, Respondent admits that it did not use the word "permanent" in hiring the replacements, because of the erosion of the employment-at-will doctrine. This admission implies that the Respondent deliberately couched its employment offer to the replacements in terms that would leave room for it to give the offer any construction that would later serve the Respondent's purpose, such as in this case, an offer that could be construed as offering permanent employee status, but in an employment-at-will situation, something less than that. The Respondent cannot have it both ways.

Accordingly, based on the statements made by Respondent to its replacement employees and Respondent's failure to use the word "permanent" in hiring them, Respondent failed to prove that it intended or that there was any mutual understanding that their employment was permanent. Furthermore, there is additional evidence that Respondent did not view their status as permanent and often sought to "have it both ways." Before the status of the replacement employees had the legal significance that it does now, Diamant referred, in an investigatory affidavit which he gave to the Regional Office on September 3, 1993, to certain conduct by the strikers on the picket line:

On May 14th, 1993, the strike commenced, and the strikers carried on their upper parts signs reading as follows: "On Strike for higher wages, better working conditions, and unfair labor practices, Local 431, I.U.E. AFL/CIO." Strikers chant out, "No give backs," besides profanity. The temporary replacements are brought into the premises in vans; however some temporary replacements drive their cars to the parking lot inside the employer's premises. The striking employees chant out to the temporary replacements, "Scabs, scumbags," and other obscenities.<sup>6</sup>

<sup>5</sup>Haines testified that, when he asked whether his job was permanent or only intended until the strike ended, Brian Maher, the quality inspection manager, told him: "[A]s far as he was concerned the job was permanent, but . . . that would have to hinge on whether or not the Union accepted the proposed contract, or if the NLRB ruled against the company."

<sup>6</sup>I have amended the official transcript to correct what appears to be inadvertent errors in the transcription of this quotation.

The counsel for the General Counsel was attempting to use these statements as an admission by Respondent that the replacements were temporary; but Diamant explained that "temporary" was not a reference to all the replacement employees, but only to three, Richard Slote, Kurt Wenzel, and Chris Badosky, an independent contractor, who were "part-time" and not full-time employees. (Diamant testified that he used the word "part-time" interchangeably with "temporary.") The question was then asked about which of the temporaries were brought in vans and which drove their cars. Slote and Wenzel were the "temporary replacements" who drove their cars, but Diamant insisted that the word "drive" should have been "drove," because they used their own vehicles before they were transported in Respondent's vans. Then Diamant was asked about the vans, specifically how many vans were involved. He initially replied one; but, when faced with the fact that he said "vans" in his affidavit, he amended his answer to three, a van rented from Wells Fargo (in which Badosky rode), a "station wagon van," and a truck. That raised the question about the reason that Respondent would have 3 vehicles for only the 3 part-time employees, especially since Respondent spent \$209,000 on guard and van escort services, and expended \$10,920 on van and truck rentals, and Shop Chairman Steven Suydam saw 2 or 3 vans, capable of carrying about 14 persons, cross the picket line each morning. Diamant finally conceded that some of the persons transported in the vans were permanent. When Diamant was asked whether, when he said that the strikers were yelling obscenities at the temporary replacements, he was referring to the fact that they were yelling only at the part-time employees, he incredibly answered that "those were the ones that must have heard." Yet he testified that part-time employees were not the only ones who complained to him about the shouting of obscenities; and he conveniently could not recall ("Been a while now") whether the only replacement employees who complained were part-time employees.

I am persuaded that more than just the two part-time employees he identified were transported in vehicles leased by Respondent to transport replacement workers through the picket line. Although Suydam could not see inside because the windows were tinted, he saw heads, sometimes as many as six to eight, and some persons ducked. It is true that the persons could be anyone, including clerical employees and supervisors, but I find that there were more unit employees than the three whom Diamant named. As a final blow to Diamant's credibility, near the close of the hearing, all parties stipulated that Slote was not even a replacement employee; and Wenzel was an independent contractor, so he could not have been an employee, either temporary or permanent. Diamant did not explain the reason that the strikers would want to call them names, and he admitted that the strikers yelled obscenities at the permanent replacements, too.

His testimony was a hodgepodge of fiction, his answers changing each time that he was confronted with a different problem relating to his statement. His reference to "temporary replacements" was, I find, a reference to all the replacements, not just a selected few. And I do not agree with the contention made in Respondent's brief that Diamant was merely referring to a time period that preceded the hiring of all the replacements. The strikers were yelling "scabs" at

somebody; and there is too much in the affidavit couched in the present tense to make me believe that he was referring to the past, rather than the present, the date of his affidavit. As a result, I discredit Diamant, and I find, as testified to by several members of the Union's negotiating committee, that at negotiations in July, when asked whether the replacements were temporary or permanent, he responded that they were temporary. If he did not realize the legal significance of the word "temporary" when signing his affidavit in September, it is probable that he did not realize it when acting as Respondent's chief spokesman at the bargaining table in July. I further find that at one time during September, when he was manning the picket line, Diamant stated to Richard DeViglio, a member of the Union's negotiating committee, that, when the striking employees returned to work, the replacement employees would be discharged.<sup>7</sup>

While Diamant was calling the replacements "temporary," I find that Aaron Carr, labor counsel to Curtiss-Wright and certainly more experienced and careful than Diamant, was not. However, the import of what he said could have led some of the union representatives, who testified that Carr used the word "temporary," to believe that he was describing temporary employees. Shortly before July 28, Everett Lewis, a partner in the law firm that represented the Union, became involved in the negotiations and telephoned Carr to persuade him to do something about Respondent's substantial subcontracting. The employees were very concerned with this issue, because there had been many employees laid off; and they were concerned about their job security. The Union had filed a grievance protesting the subcontracting, and the Board had issued a complaint about Respondent's failure to turn over certain information (a subject of this proceeding). He urged that something ought to be done to deal with this concern and suggested that Respondent bring back all the subcontracted work so that Respondent would have enough work to recall all the striking workers. Carr assured him that none of the subcontracts were long term; that the subcontracts would end within a month or two; that he would, as part of any "deal," discontinue them at the end of their terms; and that, as the subcontracts concluded, the slots would be given to recalled employees. Carr raised no question about the fact that the replacements were permanent and that there would be no openings for the strikers.

At the July 28 negotiating session, Lewis asked Carr what was going to happen with the replacements if the parties reached an agreement. Carr answered that they would be discharged and the strikers would be called back on an as-needed basis as the subcontracts ended. After the conclusion of that negotiating session, Carr faxed Lewis an example of Re-

spondent's subcontracts, a first installment, Lewis testified, showing the dates that they would be end, so that the Union would know when additional jobs were going to be available to the returning strikers. This indicates that Carr had promised to return the strikers as jobs became available as a result of the termination of the subcontracts, not necessarily a promise to return all strikers to their jobs, including those occupied by the replacements. However, should there be any doubt about Respondent's commitments, on September 7, Carr promised, in answer to Lewis's question, that Respondent would discharge all the replacements if the Union made an unconditional offer to return to work.<sup>8</sup>

Lewis and Carr talked on the telephone several times between October 15 and 29, and Lewis told him that he was trying to arrange, at the earliest possible date, a meeting of the strikers, at which he would attempt to persuade them to make an unconditional offer to return to work. Carr said that he appreciated that and wanted the workers back, never suggesting that their way would be blocked by the "permanent" replacements. At the negotiations on November 3, Lewis told Carr that, that afternoon, he was meeting with the members to persuade them to make an unconditional offer. He asked Carr, if he had such an offer, would he permit them to return and terminate the replacements? Yes, Carr answered. Lewis inquired whether he had told that to the replacements. Carr said that Respondent had told them that they were permanent unless the Board ruled that the Union's strike was an unfair labor practice strike or a settlement with the Union altered their status to temporary replacements. Lewis remarked that that was a clever way to avoid liability. Carr answered that he was not dumb enough to have committed himself absolutely to the permanence of these jobs. Lewis then said that, if the strikers returned, there would be no collective-bargaining agreement but the parties would continue to negotiate. Carr did not disagree, and again said nothing about the fact that he was going to take the position that the strikers could not return because there were no available positions.

On November 15, Thomas Kennedy, one of Lewis' partners, took over the negotiations as the Union's principal spokesman. He asked Carr how many temporary replacements were then working and Carr answered between 30 and 34 replacements. Concerned that Carr had omitted the word "temporary" in his reply, Kennedy asked whether he meant that omission. Carr responded that they were "not permanent."<sup>9</sup> Kennedy then asked whether, if the Union made an unconditional offer to return, would he replace the replacements with the returning strikers. Carr said that he did not want to answer that unless the Union made the offer. Kennedy asked whether he was refusing to answer, and Carr said that he declined to respond without a written offer. The final conversation of any moment occurred in March 1994, after Respondent had refused to reinstate the strikers. Kennedy and Carr met for negotiations, but the meeting had to be postponed that day because of a snowstorm. Kennedy stated that he thought that Respondent ought to resolve the issue regarding the reinstatement of the striking employees because the replacements were temporary, and Respondent had told

<sup>7</sup>To the extent that there is testimony which conflicts with my findings, I credit the witnesses whose testimony I rely on. In making these credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. Where necessary, however, I have set forth the precise reasons for my credibility resolutions. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

<sup>8</sup>A union committee member made a note of this: "All scabs to go when strike is over (as per lawyer)."

<sup>9</sup>This incident was essentially corroborated by two members of the Union's negotiating committee.

the Union they were temporary. Carr said that he did not say that they were temporary, but said only that they were not permanent.<sup>10</sup> Kennedy said that he did not understand the distinction. Carr answered that the strike was an economic strike and that Respondent had established a preferential list.

The foregoing recitation demonstrates that, until the Union made its offer to return to work, not once did any representative of Respondent, particularly Carr, state that the replacements were permanent. Rather, its advertisements promised only that they might be considered permanent when the strike ended; Carr denied that they were permanent; and Diamant went even further, stating that they were temporary. Both said at various times that the replacement employees would be terminated when the Union ended its strike, an admission that they were temporary, there only for the strike's duration. Carr's and Diamant's statements were utterly consistent with the position that Respondent took with its replacement employees.<sup>11</sup>

Respondent contends that its replacements were permanent for a variety of reasons. First, it argues that its arrangement with its replacement employees was permanent because the Supreme Court in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), permitted it to make the very offer it made permanent employment subject to a finding of an unfair labor practice by the Board or a settlement with the Union, which the Court stated "would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike." *Belknap* was a state misrepresentation and breach of contract action against the employer by strike replacements who were displaced by reinstated strikers. The replacements claimed that they had been offered and had accepted their jobs on a permanent basis and were assured that they would not be fired to accommodate returning strikers. The Board has twice found that *Belknap* involved only civil liability, holding that an employer could avoid civil liability to the replacements, should they be replaced pursuant to a Board order or a settlement agreement providing for the reinstatement of the strikers, by promising permanent employment subject to such conditions subsequent. *Hansen Bros.*, 279 NLRB at 741 fn. 6; *Gibson Greetings*, 310 NLRB at 1291. This is exactly the result that Carr sought: He was not "dumb enough" to have made a promise of permanence, without conditions. He wanted an escape hatch to avoid double liability.

<sup>10</sup>In an investigatory affidavit, Kennedy averred that the issue of the permanence of the replacements was not discussed in any meeting between November 15, 1993, and March 11, 1994. This conversation took place before March 11, and Kennedy testified that he did not think of the session as a meeting because the negotiations were canceled and the conversation was supposedly off-the-record, a not thoroughly persuasive response. Nonetheless, I accept his testimony, which merely repeats facts that I have already found and corroborates the testimony of witnesses for the Union and Respondent, including Carr.

<sup>11</sup>Several letters Respondent sent to the strikers were equally ambiguous, leaving open the status of the replacement employees to the Board's determination. But in a letter, dated September 9, Benante wrote to the striking employees that they "will be considered permanently replaced" if the Board determined that their strike was an economic strike. However, 2 months later, on November 19, Respondent reverted to its position that the replacements had whatever status that Respondent agreed to.

Second, Respondent contends that the applicants for employment were permanent replacements because, when they signed applications and were given notices of employment, they had to pass drug and alcohol screening tests, which are not given to temporary employees, and they were afforded benefits (medical coverage, hospitalization, life insurance) and participation in Respondent's employee savings plan deferred compensation plan ["Section 401(k) plan"] were given only to permanent employees. But its witnesses could barely agree about which employees were considered permanent. The administrator of Curtiss-Wright's plans (benefit personnel policies are set by Curtiss-Wright) defined a temporary employee as one who works under 20 hours a week or 3 months or less; and a permanent employee is employed for an unlimited duration and works full time for at least 1000 hours. Curtiss-Wright's director of benefits described a permanent employee as one who "came on board" to establish a permanent career. On the other hand, a temporary employee works for 10 to 40 hours on a specific job to be completed in a limited period. With the witnesses in disagreement, it is difficult to credit what was deemed to be permanence in this proceeding. Furthermore, despite the agreement of all that Badosky was a part-time employee, effective June 28, 1993, and full time, as of August 18, 1993, he had to take a drug and alcohol screening test on June 16, 1993, which is directly contrary to these two witnesses' testimony. Finally, the evidence that was given were the views of representatives of Curtiss-Wright, not of Respondent, whose views are of significance, if anyone's are. What Curtiss-Wright's representatives thought was not material to the mutual understanding of the employer and employee.

The essence of permanence is that the promise must be unconditional. It must be enforceable. It must not be one that the employer may use to excuse itself from the obligation of employment or to weasel out of a commitment. The problem here is that there was no commitment. Respondent's initial advertisements stated no more than the applicants' jobs might become permanent after the strike. The application form signed by all the replacement employees stated that they were employees "at-will." There was never a mutual understanding that the replacement employees would have their jobs permanently. Their continued employment was always subject to whatever Respondent and the Union agreed to at the end of the strike. Even if Carr had said that they were permanent, testimony that I have discredited, he attempted to weasel out of that obligation.<sup>12</sup> Carr admitted to Lewis that he was experienced and did not promise the replacements anything absolutely. That is the reason that employees were not happy with Respondent's announcement that was intended to calm their fears of the strikers returning to work. They were never told that they were permanent. As a result, as in *Hansen Bros.*, *Gibson Greetings* and *Harvey*, Respondent did not meet its burden of establishing that the employees hired during the strike were hired as permanent replacements. Having no substantial and legitimate business

<sup>12</sup>Carr conceded that, when, at one time, Lewis asked whether the employees could be replaced, he replied that, if the parties can come to an agreement, "we can get rid of the replacements." Even though Carr testified that he had declared that the replacements were permanent and denied that he said that they were not permanent, he admitted that Respondent had told the replacements that their continued employment was subject to an agreement with the Union.

justification for failing to reinstate striking employees, Respondent was obligated to offer reinstatement to the striking employees after they made their unconditional offer to return to work on February 22, 1994. I conclude that Respondent's failure to do so violated Section 8(a)(3) and (1) of the Act.

The complaint also alleges that Respondent committed unfair labor practices that converted the economic strike into an unfair labor practice strike by, among other acts, failing to bargain in good faith since November 3. The fundamental problem with this allegation is that the remedy is not as broad as the General Counsel and the Union may believe. With the possible exception of Vincent Mele, all of the 32 replacements were hired before November 3, the date of the alleged conversion of the strike; so their status (assuming that they were permanent employees) would be unaffected by any finding of additional unfair labor practices and Respondent would not be required to discharge them, except perhaps Mele. *Hormigonera del Toa, Inc.*, 311 NLRB 956, 957 (1993).

An analysis of this allegation requires some background. Lewis took over negotiations for the Union in July; and sometime before July 28, the date of the first negotiating session he was scheduled to attend, he telephoned Carr and confirmed what he had been told by Harold Morrison, secretary-treasurer of District 3 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, and Frederick Myers, the Union secretary-treasurer, that Respondent had promised to make some concessions in the second year of the contract, Respondent would reduce the amounts that the employees would have to contribute for their health insurance and Respondent would buy back sick leave that was owed to the employees. Lewis asked Carr not to put his concessions on the table. He thought it was premature, because there were too many other items to resolve and too much anger between the parties.

On July 28, before he met with Respondent, Lewis met separately with the Union's negotiating committee to ascertain their concerns and narrow the issues to facilitate an agreement, knowing (but not telling the committee) that Respondent was prepared to make the above concessions. The employees' principal concerns were that Respondent was subcontracting much of its work and was demanding that the employees copay on their health insurance and that their break periods and paid sick leave be eliminated. Lewis cautioned the committee not to place certain of their concerns on the bargaining table (such as pending overtime grievances), because he was attempting to limit the issues. When both sides finally met together, Carr announced, despite Lewis' request not to do so, the changes that he was willing to propose. The union committee rejected those changes.

The parties met in September and again on October 15, when Carr asked for a written proposal, and Lewis wrote out in longhand a counterproposal, in which the Union accepted Respondent's best and last offer that was made on July 2, as modified by the concessions that Carr had offered on July 28 and additional proposals made by the Union. Carr said that Respondent's best and last offer stated at the top that it was "effective until Midnight July 6, 1993," and it could not be accepted because it was no longer on the table. He asked whether this was a counterproposal. Lewis said that it

was what it was.<sup>13</sup> By letter dated October 22, Diamant rejected the proposal, except refusing to respond to the "modifications" of July 28, because he had no record of them. Carr appeared to Lewis to be very upset by Lewis' October 15 proposal, because it made it appear that Carr had left the earlier proposal on the table and it was still available for the Union to accept. Lewis said that that simply was not so, Respondent had changed its offer from the best and final offer, and what he had offered was plainly a counterproposal. Carr asked that Lewis put that in a letter, because he wanted to be able to show this to somebody whom he reported to. And so Lewis wrote Carr on October 29 to modify his earlier proposal "by characterizing it as a union counterproposal and disclaiming any possible inference that the Company's July 2, 1993 proposal remains on the table."

In the same or another conversation, after the October 15 session, Lewis told Carr that on November 3, the day they were next to meet, he intended to follow negotiations with a meeting of the strikers and to make a "very, very strong pitch for an unconditional offer to return to work," and he was convinced that he "could sell it." He said that he was preparing a memorandum to be distributed to the employees in advance of the meeting, explaining why it would be advantageous for them to accept a settlement at that time. Carr said that that was "fine."<sup>14</sup>

On November 3, the parties met, as agreed, for negotiations. Carr gave Lewis a new proposal, which he said was an attempt to "jump start" the negotiations and that it was not set in stone (or concrete). Lewis, however, immediately characterized the proposal, which contained the following changes of positions, with one exception, for the first time, as "pretty terrible." The proposal, rather than containing a union-security provision, gave employees only the right to join the Union after 365 days of employment. The trial period for all employees was extended to 365 days. The regular workweek was any 40 hours. Overtime would be any work after any 40 hours. There was no arbitration clause. Grievances ended with the written position of Respondent by its corporate director of labor relations. Respondent had the right to hire employees at will and discharge employees for any reason. There was a no-strike clause, but no no-lockout clause. Respondent deleted the seniority provision. Respond-

<sup>13</sup>This was rather disingenuous, hardly the type of behavior that would have endeared Lewis to Carr. Lewis was well aware that the offer was no longer on the table, because the Union had rejected it unanimously (51-0) and had made a different proposal on September 7, to which Respondent had made its own counterproposal. To the extent that par. 18(b) of the complaint alleges that Respondent committed a separate violation by rejecting the Union's offer to accept a previously withdrawn offer, I dismiss the charge, noting that the counsel for the General Counsel did not brief this "violation" and appears to have abandoned it.

<sup>14</sup>Diamant testified that he knew of the conversation between Lewis and Carr between October 15 and November 3 in which Lewis said that a meeting would be held at which a vote would be taken regarding the strikers' unconditional offer to return to work. Indeed, those caused the rumors that distressed the replacement employees and caused him to issue the November 19 clarification of their status. I discredit Carr's denial that he had any such conversation with Lewis.

ent revived its proposal to remove certain employees<sup>15</sup> from the bargaining unit, more employees than the proposal to amend the unit that it had withdrawn on September 7. Management and temporary employees were entitled to do bargaining-unit work. Respondent could subcontract at its pleasure. In Lewis's opinion, the entire proposal was somewhat worse than having no agreement at all. But Lewis told Carr that he was still going to meet with the union members that afternoon to persuade them to return to work.

Lewis then left to make his "pitch" to the membership, an approach that he and the Union's leadership had planned to take 2 weeks before. He explained that the employees would have to offer to return to work "to get the meter running." He, however, had to advise the employees that, if they made an unconditional offer to return to work, they would be returning under Respondent's last offer, which was "pretty horrendous"; and he then explained what that offer was. He thought that Respondent was trying to discourage the strikers from making an offer to return by presenting its proposal at the eleventh hour, but the employees should "fool" Respondent by returning and that, if Respondent paid them less than the returning strikers, it would be an unfair labor practice. (Respondent paid its returning strikers what they were earning before they began their strike, more than \$15 per hour, but paid its replacement employees only \$12.75.) Otherwise, the Union would continue to negotiate for a new agreement. One employee asked what was to happen with the replacement employees, and Lewis replied that the members need not worry because he had been advised that they would be discharged. Probably not all the strikers would get their jobs back at once. Respondent was subcontracting work and it would be too costly to discontinue those jobs; but Respondent would call back the strikers on an as-needed basis.

However, the members were very angry or, in the words of Suydam, who was prepared to recommend to the members that they vote to return to work, "went crazy [and] were totally outraged and wouldn't even consider it. They were just ferocious. It was out of my hands. I couldn't talk them into doing anything at that point." They were "literally screaming and yelling all over the place." A principal complaint was that the employees could not return to work when they could be discharged for no reason. It would be like a "shooting gallery." Respondent would "pick off" the employees one by one and there would be no right to arbitrate. Members wondered whether they would not be better off without having a union, rather than accepting that kind of "garbage." The union membership clause was outrageous; they would not even consider it. Respondent completely disrespects the employees, one employee complained. They think that we are fools. The proposal to end the strike and return to work was unanimously turned down.

In determining whether an employer has engaged in bad-faith bargaining, the Board examines the totality of the employer's conduct, both away from and at the bargaining table, for evidence of its real desire to reach agreement. *South Carolina Baptist Ministries*, 310 NLRB 156 (1993); citing *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enf. 938 F.2d 815 (7th Cir. 1991); *United Technologies*

<sup>15</sup> Shipping and receiving employees, liquid penetrant inspectors, welders, and parts movers.

*Corp.*, 296 NLRB 571, 572 (1989). It is proper to examine the positions taken by Respondent throughout bargaining, the manner in which Respondent advanced those positions, and Respondent's commission of other unfair labor practices. *Ibid.*

In *Reichhold Chemicals*, 288 NLRB 69 (1988), reversed on other grounds sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990); supplementing 277 NLRB 639 (1985), the Board held that, in some cases, a party's proposals that go beyond mere aggressive "hard bargaining" may themselves constitute bad-faith bargaining. The Board stated:

That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.

The majority in *Reichhold* at 70, quoted with approval from the Ninth Circuit opinion in *NLRB v. Mar-Len Cabinets*, 659 F.2d 995, 999 (9th Cir. 1981), holding that, although caution must be exercised in inferring motivation from the content of bargaining proposals:

Nevertheless, proposal content supports an inference of intent to frustrate agreement where, as here, the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.

There was nothing particularly remarkable about the beginning of bargaining, or about the bargaining up to November 3. There were no wholesale discharges or illegal layoffs of employees or other evidence that Respondent was attempting to destroy the integrity of the unit by taking direct action against its employees. There are some violations, discussed below, which are helpful in considering whether Respondent acted in good faith; but what is particularly critical is an analysis of Carr's reasons for his November 3 changes. Carr testified that he had talked with Respondent's management and had been advised that Respondent was surviving the strike very well and was in good condition. In addition, Respondent's management gave him specific reasons that prompted him to amend various proposals. Regarding the "union security" clause, Diamant advised him that the replacements were uneasy about joining the Union. He proposed the deletion of the seniority clause because one of Respondent's major contracts, the Seawolf submarine project, had been terminated while Respondent was working on it, and approximately 60 employees had been laid off. As a result of the seniority clause, Respondent had to lay off some junior employees with greater skills than their seniors; and if there was ever another layoff, management did not want to lose those skills again. He revised the subcontracting clause because management believed that, under the old contract, it had the unlimited right to subcontract, without challenge. That was wrong, he found out, and his amendment was intended to correct that. He revised the clause dealing with the prohibition of management doing bargaining unit work because he had been advised that, particularly at the

end of the month, management needed to help out when shipments had to be made, and such work would not necessarily require the hiring of other employees. He revised the discharge-for-just-cause clause and the no-strike-no-lockout clause and removed arbitration because, on the first day of negotiations or the day before, Respondent had issued 13 reprimands resulting from a mass walkout when employees were asked to and refused to work overtime. Management wanted the unchallengeable right to discharge them in the event that conduct reoccurred. He then explained that the elimination of the no-lockout clause was a quid pro quo for the elimination of the just cause clause and arbitration.

Recognizing that an employer has the right to change its proposals as a result of changes of strength during a strike,<sup>16</sup> Carr's explanations of many of the changes make little sense. Carr was involved in negotiations from the beginning. Although for a while he did not act as the chief spokesman, he helped to prepare all of Respondent's proposals made throughout the negotiations, approved all proposals, and had complete control over the progress of negotiations. Many of the November 3 proposals were not initially raised in a "wish list," "throw-in-the-kitchen-sink" kind of proposal that one frequently sees in a party's first proposal. Yet some reasons that Carr used to support the changes arose from situations that happened before or at the time the negotiations began. Respondent lost the Seawolf project on February 19, 1992, and laid off its employees on February 28, 1992, using the seniority clause as the basis for selecting the employees. If seniority had really resulted in the loss of more skilled employees, surely Respondent would have been made a proposal at the start of negotiations more than a year later, on April 15, 1993, and not waited until November, almost 7 months after that. There was no reason for the withdrawal of the arbitration clause. The event Carr talked about occurred in April; and, had it really been of importance, Respondent would have proposed it immediately.

Respondent might have properly amended its proposals to respond to either changed circumstances that arose since the beginning of negotiations or its attempt to recoup the costs of the strike or to return to proposals that Respondent had withdrawn earlier and now felt that the timing was ripe to revive them. But those kinds of reasons were also lacking. Although the proposal broadening the management-rights clause to permit the subcontracting of any work without restriction could be justified, it defies credulity that, only just before November 3, and not earlier, Carr first learned that there was a restriction to the clause permitting Respondent to subcontract. Carr attended every session of negotiations. He was aware that there was a pending grievance, a demand for information, and an unfair labor practice complaint. He must have read the applicable provision of the collective-bargaining agreement before, and I so find. I thus find that there was no reason to propose the amendment in November except to interfere with and disrupt the Union's vote to return to work that afternoon. And the proposal to limit an employ-

<sup>16</sup> *Rescar, Inc.*, 274 NLRB 1, 2 (1985). In *Hickinbotham Bros., Ltd.*, 254 NLRB 96 (1981), the Board permitted an employer who had weathered a strike to capitalize on its new found strength to secure contract terms it desired. There, the employer had made a number of concessions in an effort to avoid the strike. With the realization of its strength, it withdrew those concessions; and the Board said that it could.

ee's right to join the Union is not a union-security clause, which by definition makes a person's employment contingent on a continuing relationship with a labor organization. What Respondent proposed has no relation to a person's job, except that it is a limited yellow dog contract, prohibiting an employee from joining the Union for the first year's employment, and that is none of Respondent's business. Section 7 provides that employees have the right to engage in union activities, without any restrictions. Respondent's proposal violated Section 8(a)(1) of the Act by interfering with that right.<sup>17</sup>

Carr's justification for his elimination of the no-strike clause (which was not removed), as a quid pro quo for the removal of the arbitration clause and the discharge-for-just-cause clause, was particularly unappealing:

Q. [By Mr. Lewis] You also said that the quid pro quo for eliminating the arbitration provision and the just cause provision was removing the no lock out clause?

A. [By Mr. Carr] No strike, no lock out, I thought I said.

Q. But in fact—the no strike provision was left in the contract—

A. Yeah, yeah, and we were—

Q.—isn't that true?

A. Yes, you're correct.

Q. There really wasn't any quid pro quo in there.

A. Right. Well, you're correct that I only removed the lock out, I think.

Q. Well how was there a quid pro quo in that case?

A. I thought if I moved the company wouldn't lock out if the company had a just—didn't have to worry about just cause.

Q. So it's your opinion there was a quid pro quo that the company could fire people at will, not arbitrate it, and in exchange for that, they would agree not to lock them out?

A. Yeah.<sup>18</sup>

Diamant testified that Respondent never intended its November 3 proposal as a final offer. The question then is the reason that Respondent ever made the offer. Carr stated, without further explanation, that he made his new proposals to "jump start" negotiations. A jump start might be appropriate when negotiations have stalled, but the negotiations were moving forward. The Union's acceptance on October 15 of Respondent's July 2 proposal was of no small significance. It demonstrated substantial movement (Lewis termed it "drastically scaling back") from the terms that the Union originally proposed and some agreement with Respondent's attempt to cut back its labor costs. Indeed, just 1 month before, on September 14, Diamant wrote to Morrison, com-

<sup>17</sup> This was not alleged in the complaint, but it was fully litigated. I asked the parties to brief the issue, and the General Counsel and the Union contended in their briefs that there was a violation, and Respondent argued essentially that there was good-faith bargaining and it amended its proposal to reflect a proper union-security clause. I find it appropriate to include in my recommended Order relief for this violation.

<sup>18</sup> In addition, Carr never explained the reason that he resurrected the change of the bargaining unit after withdrawing it in September.

plaining that the Union's offer of September 7 was "unrealistic" because it proposed a 65 cents per hour wage increase each year of the agreement and "a refusal to give up breaks, an elimination of only two sick days a year; as well as other benefits." Diamant wrote that he had assumed that the Union would propose a counteroffer "close to our [July 7 best and final] offer." Now the Union had, albeit belatedly.

In addition, it had to be obvious to all parties that the Union was losing the strike. Four striking employees had crossed the picket line in August, nine in September, and one more in October. Between October 15 and the November 3 negotiations, Lewis told Carr that he was trying to end the strike and that he would be meeting with the employees after the November 3 negotiations to convince them to return to work. Lewis had candidly told Carr that he wanted to end the strike, even if Carr did not accept any of the Union's additional modifications that it intended to propose, and that the employees would return even without a contract. Carr admitted that he understood that Lewis was trying to drive the committee toward a settlement. Carr met that qualified surrender with a proposal that had little substantive relationship to what Respondent had been seeking prior to November 3. He could not have done so in order to end the strike. Carr had to know, as Lewis was to tell the employees at the meeting, that the employees would be returning under Respondent's last offer. Further, Carr did not propose these changes, because he wanted them. Over the next weeks and months he withdrew or drastically scaled back many of the more Draconian portions of his proposal despite the fact that Respondent was bargaining from a position of strength and the Union from weakness. So the only reason that he could have made them on November 3, I find, was to interfere with the Union's meeting, not to jump start, but to put the brakes on the progress of negotiations, and, more maliciously, to throw them into reverse. That is not good-faith bargaining.

The proposal also went far beyond hard bargaining, containing the illegal "union security" provision and, when viewed as a whole, a proposal that would have left the Union members better off without the Union and without a contract. With the proposal, they had no right to strike and no right to arbitrate and Respondent could lock them out, contract out all their work, use management to do all their work, and use temporary employees to meet peak production requirements and emergency needs, even if unit employees were on layoff. Without the Respondent's proposal, if there were something that Respondent did and the employees wanted to protest, at least they would have the right to strike. Respondent's proposal thus provided employees with fewer rights than imposed by law without a collective-bargaining agreement, and that violated Section 8(a)(5) and (1) of the Act. *South Carolina Baptist Ministries*, supra, 310 NLRB at 157. An employer acts in bad faith when, during negotiations, it simultaneously insists on a broad management-rights clause, a no-strike provision, and no effective grievance-and-arbitration procedure. *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn. 7 (1976). Carr's November 3 proposal forced the Union to surrender its statutory right to strike, without offering any incentive to do so. *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); *Modern Mfg. Co.*, 292 NLRB 10 (1988); *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). As the

Board concluded in *Hydrotherm, Inc.*, 302 NLRB 990, 995 (1991):

In sum, the Respondent's proposals, considered as a whole, would have left the employees and their representatives with less than they would enjoy by simply relying on the certification, without a contract. This is not the conduct of an employer sincerely attempting to reach an agreement, and it is not good-faith bargaining. [Citation omitted.]

Respondent's answer is that its proposals were not set in stone, that it continued to negotiate, that it changed its position on numerous proposals, that it never held out for any of its proposals to the bitter end, and that it ultimately reached agreement on all the issues, except for the reinstatement of the replacement employees. But what it did was to foster the continuation of the strike, by imposing terms that its striking employees would be hard-pressed to agree to. It surely delayed negotiations, at a time when Lewis had announced that he was trying to convince the strikers to return to work. Many of the offensive clauses lingered far beyond the date that the Union made its unconditional offer to return. The parties did not agree to the general principle of an arbitration provision covering all disputes until October 1994; seniority, July 19, 1994; subcontracting and performance of work by management, May 16 or 18, 1994. In addition, the fact that agreements were reached must be tempered by the realities of Respondent's proposals. I agree with Kennedy's assessment that collective bargaining had lost its meaning:

Because I didn't think that these matters were really the subject of what I would call collective bargaining, because it didn't seem to me that the company really had any basis for most of the proposals they were making. The collective bargaining, in my view, ended on October 15th, and at that point we were simply treading water and wasting time in an effort to get back basic minimal protections that the company was really willing to give us but was interested in killing time first before they got around to it. . . . So collective bargaining to the sense we met at reasonable times and reasonable places. There was somebody from the company, there was somebody from the union, yes. But I don't know that it was collective bargaining that was going on.<sup>19</sup>

Respondent further justified its position by citing *Logemann Bros. Co.*, 298 NLRB 1018 (1990), but it and similar decisions relied on by Respondent are inapposite. There, the employer proposed a number of restrictive changes and afterwards attended negotiating sessions and continued to bargain, reaching agreement on many subjects that were identical to the contractual clauses in the expired contract that the union wanted to extend. But these decisions

<sup>19</sup> Kennedy gave as an example of the futility of bargaining his agreement on November 16 to a probationary period of 45 days. He said it had no real meaning, because Respondent had proposed no discharge for just cause clause or arbitration clause, so all employees, probationary or not, could be discharged for any or no reason and the Union had no right to arbitrate. Thus, an employee could work for a year and have the same rights as one who was on probation.

related to proposals that the employers made early in the negotiations and were explained by the employers. The proposals were not made, as here, 5 months after negotiations commenced, timed for the union meeting that afternoon, and given rationales that I have not credited.<sup>20</sup>

Finally, Respondent contends that, even if the strike were prolonged by its commission of unfair labor practices, its continuation of bargaining with the Union and ultimate withdrawal or settlement of the various offensive proposals converted the unfair labor practice strike to an economic strike, relying on *Chicago Beef Co.*, 298 NLRB 1039, 1055–1056 (1990), enf. mem. 944 F.2d 905 (6th Cir. 1991). That decision, however, holds only that: “In order to reconvert an unfair labor practice strike, an employer must ‘unequivocally repudiate and rescind [its] unlawful actions.’” *F. L. Thorpe & Co.*, 315 NLRB 147, 151 (1994). In footnote 11, the Board explained that it did not wish to suggest that a reconversion could never take place if an employer’s attempted repudiation did not meet all the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). That decision requires that Respondent must repudiate the illegal conduct. The repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. In addition, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer’s part after the publication. Finally, there must be assurances to the employees that in the future the employer will not interfere with the exercise of their Section 7 rights. *Id.* at 138–139.

Carr’s withdrawal of certain of his proposals at the bargaining table does not satisfy Passavant in any of these respects. The strike was clearly prolonged by what occurred at the bargaining table on November 3, and Respondent did not communicate with the striking employees about that conduct, so that the illegal conduct was never removed as a factor in prolonging the strike. Whatever may be the limitations imposed by *F. L. Thorpe*, I conclude that Respondent engaged in bad-faith bargaining<sup>21</sup> and violated Section 8(a)(5) of the

<sup>20</sup> Unlike Respondent, the employer in *Sage Development Co.*, 301 NLRB 1173 (1991), sought concessions because of its substantial financial losses in the 3 years preceding negotiations. There was no evidence, as there is here, of changes of position from bargaining session to bargaining session or of proposals that would drastically curtail the union’s representation rights. In *Commercial Candy Vending Division*, 294 NLRB 908 (1989), the employer supported its proposals with legitimate business rationales and justifications. In *Barry-Wehmiller Co.*, 271 NLRB 471, 473–474 (1984), the Board permitted an employer to make changes in its proposals when they were reversions to earlier or original proposals which it had modified in attempting to secure agreement without a strike. When the strike occurred, the basis for those concessions no longer existed. Other changes were engendered by circumstances relating to the strike. Yet other changes were to proposals advanced when the Respondent made its initial proposal. In *Challenge-Cook Bros.*, 288 NLRB 387 (1988), the employer announced its intention to hire permanent replacements and proposed to delete a longstanding union-security clause to counter the Union’s show of strength (the strike) and to curtail an aspect of the Union’s strength. It could do so. Respondent could have legally proposed to delete the union-security clause here or proposed a legal alternative to the union-security provision contained in the expired agreement. It did not do so.

<sup>21</sup> Carr never explained the reason that he resurrected the change of the bargaining unit after withdrawing it in September. Recognizing that parties may continue to bargain about permissive subjects

Act and that Respondent’s conduct prolonged the strike<sup>22</sup> and converted what was an economic strike into an unfair labor practice strike. *C-Line Express*, 292 NLRB 638 (1989). Accordingly, Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the striking employees.

There are a number of other alleged violations of the Act, some relating to bad-faith bargaining, that I find. Early in negotiations, and in Diamant’s letters dated September 8 and 14, Respondent had rejected the Union’s proposal that the unit employees should be permitted to participate in the Section 401(k) plan, which it insisted was only for exempt employees, namely nonunion hourly employees. However, Respondent permitted its replacement employees to participate in that plan, after they met the plan’s eligibility requirements,<sup>23</sup> when it first hired them in July 1993; and it also permitted its returning strikers to participate. On November 15, Kennedy charged that the replacement employees and the striking employees who returned were allowed to participate in the plan. He demanded that all employees be able to participate, contending that it was unlawful to offer it to the replacements and returning strikers and not to the unit employees. Carr pleaded ignorance, but said he would find out. On November 23, Kennedy again raised the question of the unfairness of Respondent’s position. Carr replied that Respondent’s management had presumed that, once the returning strikers had resigned from the Union, they were nonunion and thus were entitled to be covered under Respondent’s plan that provided benefits to all employees who were not bargaining-unit employees. Carr then offered the Section 401(k) plan to all employees. The day after, Carr, wrote to Kennedy:

The Company maintains that it offered the Plan to non-strikers because under the terms of the Plan all non-union employees have a right to participate after one year of service. Since the non-strikers were not bargaining unit members and had one year of service, the Company was obligated under the terms of the Plan and Internal Revenue statutes to afford them participation. Hence, our actions were not discriminatory. We refer you to *Sun Elec. Corp.*, 116 LRRM 2178 (CA7, 1984); *Pilot Freight Carriers*, 92 LRRM 1246 (1976). Never-

of bargaining up to the point of impasse, I find that the proposal was nonetheless interjected to increase the Union’s reluctance to end its strike. However, because the parties never reached an impasse, I conclude that Respondent did not violate the Act by seeking to change the unit description and recommend that that allegation be dismissed. Another act that the General Counsel contends is evidence of Respondent’s bad faith is that on December 16 Kennedy accepted Respondent’s package of changes of benefits, including sick pay, jury pay, and bereavement pay. Carr then stated that Respondent really did not want to change the bereavement provision. Kennedy said that it was awfully late in negotiations to be making proposals that were not critical to the parties.

<sup>22</sup> Respondent also contends that there is no proof that the employees would have voted to return to work, but there appears to be a reasonable chance that that would have happened, because of the support of Suydam, who was the shop chairman. In any event, if there is a failure of definite proof, it is caused only by Respondent’s unfair labor practice; and Respondent should not take advantage of its own illegal act in order to avoid liability in this proceeding.

<sup>23</sup> Respondent’s 401(k) plan is available after 1 year’s employment.

theless, any issue of discriminatory treatment has been eliminated by our proposal in this regard.

Respondent could change the wages and terms and conditions of employment of its employees only if it and the Union had reached a bargaining impasse. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In the absence of an impasse, its coverage of the returning strikers under the 401(k) plan was a change that violated Section 8(a)(5) of the Act, because they had never been covered by that plan before. The theory of the complaint is that Respondent violated Section 8(a)(3) and (1) of the Act, because it permitted its returning strikers to be covered under the 401(k) plan, while refusing to permit those employees who were still striking to be covered under the same plan. I agree. In the circumstances of this proceeding, I conclude that Respondent's conduct tends to impart the message to the employees that they can get more from Respondent directly than through their collective-bargaining representative. It thus discourages them from continuing to engage in the strike, lawful union activity and concerted activity protected by Section 7, because they could obtain at least one of the benefits that they sought by discontinuing their strike and returning to work.<sup>24</sup>

Respondent contends that no violation should be found because Respondent merely made a mistake and corrected it, again relying on *Passavant*. However, the mistake was clearly a violation of the Act, and Carr's reversal of positions at the bargaining table did not satisfy the requirements of *Passavant*. Among other things, it failed to publish a repudiation of its conduct to all members of the unit and to assure them that in the future it would not interfere with the exercise of their Section 7 rights.

At the negotiations on December 16, Kennedy insisted on wage proposals. Carr said that he was going to recoup the money that the strike had cost. Although he had said earlier that the cost was \$750,000, he now said that the good news was that the amount had been reduced to \$554,110.24 and gave Kennedy a schedule of expenses that he represented were strike-related. He vowed that Respondent would recoup these costs in negotiations. (As Diamant stated in his October 22 letter to Myers, Respondent "has unnecessarily spent a great deal of money because of your lack of leadership in commencing and then prolonging a needless strike. We intend to recoup every penny.") That would not normally be an illegal objective; but among the expenses that Respondent sought to recoup was \$1000 for "Travel N.L.R.B. & Misc.," which represented Respondent's costs in defending against unfair labor practice charges filed by the Union, some of which became the basis for the complaint in this proceeding. The costs included travel to the Board's Regional Office to give Diamant's five affidavits, the cost of lunches, and the staff cost of responding to the Board. Kennedy said that Respondent's demand was illegal and its schedule of expenses

<sup>24</sup>To the extent that the complaint bases the same violation on Respondent's offer of its 401(k) plan to the replacements, I find no violation. Respondent is entitled to set the terms and conditions of the employment of its replacement employees, even when it grants them more or less than it granted or offered to its regular employees. *Harding Glass Co.*, 316 NLRB 985 (1995); *Goldsmith Motors Corp.*, 310 NLRB 1279 (1993); *GHR Energy Corp.*, 294 NLRB 1011 (1989).

would be an exhibit at a Board hearing.<sup>25</sup> Kennedy thought that it was outrageous and unreasonable for Respondent to attempt to recoup any of these costs, particularly because the employees had also suffered losses, having been out of work for seven months. If Respondent's position was that the Union had to pay penny for penny the strike cost Respondent had absorbed, as Diamant had written on October 22, that made it impossible to resolve the parties' dispute.

Respondent does not deny these facts, but contends that it never relied on the document again. That is not true. On January 11, 1994, Carr complained that the Union's proposals did not make up for Respondent's loss of \$554,000. Kennedy agreed, saying that they never would. Even if Carr had made no specific reference to the schedule, his failure to repudiate the schedule meant that all his future wage proposals were less than what he would have given had the Union not filed unfair labor practice charges. By seeking to recoup these costs, Respondent necessarily impeded and hampered the Union's right to seek redress for violations of the Act. That violated Section 8(a)(1) of the Act.<sup>26</sup>

At some point before negotiations began, Myers and the shop committee asked Diamant what work was being subcontracted by Respondent and the reasons that the jobs could not be performed "in house." Diamant promised repeatedly that he would supply information in 10 days, but he never did. Sometime after October 1992, the Union filed a grievance against Respondent for undermining the Union through its continuous subcontracting of work, which had caused and would worsen the then current layoff situation of the Union. The Union had 25 employees on layoff and requested as relief the immediate cessation of subcontracting until all of the bargaining unit personnel then on layoff had been recalled. In connection with that grievance, Suydam requested information. Diamant and Robert Pierce, Respondent's then director of manufacturing operations, refused to give it to him, so he or Myers contacted Lewis to make a more official demand. On November 12, 1992, Lewis requested the following information:

1. A listing of all subcontracts from Target Rock to vendors and subcontractors on which work has been performed in the past year whether at the vendors premises or at Target Rock.
2. As to each such contract, please advise as to the date on which it was executed, the nature of the work to be performed, the number of units to be produced, the number of man hours required for such production, and the gross dollar amount paid by Target rock [sic] to the subcontractor or vendor. (The Union reserves the right to request, but does not at this time seek, copies of each such contract.)
3. As to each such contract, state the reason Target Rock chose to subcontract rather than to have the work performed in house. Also, provide us with the dates, times and names of the Union officials with whom such subcontracts were discussed.

<sup>25</sup>It was.

<sup>26</sup>I do not hold that Respondent had no right to recover the extra costs it incurred as a result of the strike; but it has no right to demand moneys that would affect the employees' right to seek redress from the Board.

Sometime after receiving this letter, Carr spoke to Lewis on the telephone. Although their recollections differed, both agreed that Carr refused to supply this information and said that he would supply legal authority to support his position. On January 14, 1993, Carr wrote to Lewis that his request was inappropriate, because the contract gave Respondent the unrestricted right to subcontract. Citing *Hughes Tool Co.*, 100 NLRB 208 (1952), he refused to supply the information. *Hughes Tool* holds that an employer has no obligation to give subcontracting information when it has the unrestricted power to subcontract. Unfortunately, as Carr testified (somewhat questionably) he learned later, the agreement did not provide for the unrestricted right to subcontract, but stated that the right had to be “consistent with the best interests of the business, as long as such is not done for the purpose of undermining the Union.” Thus, Carr’s reliance on *Hughes Tool* was incorrect. In late July 1993, Carr supplied some of the information. On November 15, Carr gave Kennedy a document in reply to Kennedy’s request. Kennedy was unhappy with that response and asked for more information. Carr agreed to give him that, but made him sign an agreement to hold the information confidential, which Kennedy signed on November 22; and the information was produced within a month or so thereafter.

There is little question that, under ordinary circumstances, the request should have been complied with. The information was clearly relevant to the essence of the grievance, and the Union had a right to it. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Respondent contends, however, that when Carr and Lewis spoke, it was agreed that Carr would supply his legal theory and Lewis would supply his. Because Lewis did not supply any authority, its argument continues, the Union waived its right to the requested material. I do not credit Carr’s testimony that Lewis agreed to supply any authority. Carr’s January letter made no mention of the fact that he was looking forward to Lewis’ reply and citation of authority. Furthermore, the Union’s filing of its unfair labor practice charge on January 13, before Carr wrote his letter, indicates that Lewis rejected Carr’s legal position. Finally, even if I credited Carr, nothing that Lewis said constituted a waiver of a statutory right, which must be clear and unequivocal, *Chesapeake & Potomac Telephone Co.*, 259 NLRB 225, 229 (1981), *enfd.* 687 F.2d 633 (2d Cir. 1982). I conclude that Respondent violated Section 8(a)(5) and (1) of the Act. It is true that Respondent finally produced the material almost a year after the initial demand was made. That does not make the complaint’s allegation moot. Rather, a delay also constitutes a violation of the Act. *American Commercial Lines*, 291 NLRB 1066, 1083 (1988).

The last unfair labor practice that I find concerned a bribe testified to by Suydam, as follows: In the springtime, there had arisen significant problems of Blue Cross’ handling of various medical claims. Suydam had discussed these problems with Diamant and other people in management. The problems were so severe that Respondent had set up meetings with Blue Cross, which did not result in the resolution of all the problems, including the payment of a \$1200 claim of Union Secretary William Perry. On about May 5,<sup>27</sup> before

<sup>27</sup> The date may be incorrect. The unfair labor practice charge involving this incident was filed on May 5, but the Union’s attorney signed it on May 3. That date may be the one that is incorrect.

the old collective-bargaining agreement expired, Diamant asked Suydam whether he would be willing to extend the agreement for 2 weeks. Suydam said that he would not and gave the same answer when Diamant asked him whether he would be willing to extend the contract for 1 week. Ten minutes later, Diamant asked Suydam whether he was sure that he would not extend the contract for 1 or 2 weeks, and Suydam said that he was. Diamant then added: “Even if I offered to pay the outstanding \$1200 medical bill of” Perry? Suydam replied that that bill had nothing to do with the negotiations, that he did not wish to discuss it further, and that he wanted Diamant to leave. The next day, at the weekly grievance meeting, Diamant asked whether Suydam had changed his mind about what they had talked about the day before, and Suydam said that he had not. Diamant then said, “Well, I withdraw that, anyway,” to which Suydam stated: “It’s a little bit late for that, isn’t it?” (Perhaps Suydam knew that an unfair labor practice charge had already been filed.)

Diamant denied this narration. Rather, he confirmed that he asked Suydam for a 2 weeks’ extension because negotiations had started slowly, but he never mentioned Blue Cross, nor did Suydam. When Diamant finished this conversation, he headed back to his office and passed Perry, who was at least 25 feet away and who asked whether he had heard anything about his medical claim for his son. Diamant said that he had not and returned to his office. He never returned to Suydam and never asked him for a contract extension again.

Suydam was a current employee who had little reason to make up this rather bizarre story of a bribe for an extension of the contract. Diamant, on the other hand, tried to explain his use of “temporary” in a most unbelievable way, so unworthy of crediting that I generally credit him only when his testimony was supported by another more believable witness or his statement was against the interest of Respondent. In a nutshell, Diamant was capable of concocting anything. Here, however, the counsel for the General Counsel adduced testimony from Myers about a conversation that he had with Suydam. I permitted Myers to be questioned, over Respondent’s objection, on the General Counsel’s representation that his testimony would be connected with other testimony. An appropriate connection was never made and, if a motion were made, I would have stricken the testimony. In the meantime, on cross-examination, Respondent’s counsel showed Myers what appeared to be an inconsistent statement, his investigatory affidavit, in which he stated that in April Suydam told him that Diamant had said that, if Suydam “worked on behalf of” Respondent during the contract negotiations, Respondent would pay Perry’s outstanding medical bill of \$12,000. I nonetheless credit Suydam. I found Myers’ memory extremely poor, and I do not trust the details of his recollections. I have not relied on his testimony in this decision. In any event, the statement that he gave to the Regional Office was ambiguous to the extent that “working on behalf of” Respondent could have encompassed Suydam’s agreement to a contract extension. Furthermore, Myers’ recollection of the date (April instead of May) and amount (\$12,000 instead of \$1200), although clearly erroneous, were not utterly baseless, being off only by a month or a zero. I refuse to credit him. Instead, I credit Suydam and find that Respondent violated Section 8(a)(1) of the Act.

There are a number of alleged violations of the Act that I do not find. Respondent did not violate the Act by proposing wage decreases at the bargaining table, while paying the strikers who returned to work the same wages that it paid them before the strike. Respondent was obligated to pay its returning strikers those wages, because it could change them only if the parties had reached a bargaining impasse. *Taft Broadcasting Co.*, supra. I doubt that, assuming the same employees had never joined the strike, the General Counsel would have questioned Respondent's right to continue to pay them what it had paid them before the strike began. In light of the Union's position, however, that Respondent was not legally entitled to pay the returning strikers as much as they did, while making a lower offer at the bargaining table, it is not surprising that Respondent withdrew its offer, in part, because Carr did not wish to commit an unfair labor practice by making an offer that would be considered discriminatory. There should thus be no complaint that Respondent "unreasonably delay[ed] a proffer of valid wage proposals," as the General Counsel's brief contends, when the wage proposals were, in fact, valid.

Finally, Carr testified that his proposal for wage decreases was intended to be applicable to all employees, even though he did not say that it was applicable to the replacements or the strikers who had returned. Carr testified that he had never, at least purposefully, made a wage proposal that distinguished between those employees who returned to work during the strike and those who might return after. Kennedy admitted that Carr never said that it intended to apply its wage decrease proposal only to strikers still out of work. And Kennedy could not have believed that the returning employees were going to get less, because he told the strikers, at the meeting which led to the unconditional offer to return to work, that they would return at their prestrike wage rates. The General Counsel's brief complains that, if the Union ever agreed to a wage decrease, Respondent "would have effectively undermined the status of the Union by establishing that the Union had been responsible for the wage decrease suffered by the strikebreakers after the end of the strike. There could be no stronger method of discouraging union activity than to establish among strike breakers that they could maintain higher wages without the Union, than they could under a collective-bargaining agreement." That happens in every instance that the Union calls a strike and some employees do not honor the picket line or cross it. Respondent was complying with the Act. Sometimes a union does not have sufficient strength to attain its goals, but the fact that the employer wins the economic contest does not mean that it has done so illegally.

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes

burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to bargain in good faith with the Union and shall order it to immediately reinstate the former strikers, whose names appear in the Order, and all other employees who applied unconditionally for reinstatement, to their former positions or, if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, discharging, if necessary, all employees hired to replace them. If, after such dismissals, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other non-discriminatory practices utilized by Respondent.<sup>28</sup> The remaining former strikers for whom no employment is immediately available shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by Respondent, and they shall be reinstated before any other persons are hired. I shall further order Respondent to make whole those former strikers, including those named in the Order whose reinstatement was delayed, for any loss of wages and benefits they may have suffered by reason of Respondent's refusal to reinstate them in accordance with their unconditional requests to be reinstated. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]<sup>29</sup>

<sup>28</sup> During the hearing, Respondent sought to show that, when the strike began, there were 59 positions filled by bargaining-unit employees and, when the Union made its offer to return to work, there were only 47 positions. I sustained an objection to the general area of questioning on the ground that I had not even found an unfair labor practice and that, if I did, the availability of work was more properly directed to the compliance stage of this proceeding. Obviously, if work was not available for certain of the employees named in the Order, they are not entitled to any backpay. For the purposes of limiting Respondent's liability, I note that the parties stipulated that the following employees resigned from their positions on or about the following dates: Clarence Semple, August 13, 1993; Jan Lucas, November 12, 1993; John Cobin, March 25, 1994; and Leonard Barlitz, July 13, 1994.

<sup>29</sup> Respondent and the General Counsel moved to amend the official transcript in various respects. There being no opposition, their motions are granted.